

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CARL A BROOKS,

Petitioner,

v.

THE INDETERMINATE SENTENCE  
REVIEW BOARD,

Respondent.

Case No. C05-5301RJB

REPORT AND  
RECOMMENDATION

**NOTED FOR:**  
**August 19<sup>th</sup>, 2005**

INTRODUCTION AND SUMMARY CONCLUSION

This 28 U.S.C. § 2254 petition for habeas corpus relief has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636 (b) and local Rules MJR 3 and 4. In reviewing the petition prior to service the court noted that petitioner had failed to allege facts showing exhaustion and failed to name a proper respondent. The court entered an Order to Show Cause. (Dkt. # 5). Petitioner's response to the order shows asks this petition be **DISMISSED WITHOUT PREJUDICE**. (Dkt. # 4).

FACTS

Petitioner challenges a 1978 conviction. He has not exhausted any issue in the petition and an order to show cause was entered. In response to the Order to Show Cause petitioner asks this

1 action be dismissed and requests the court “grant him an appropriate extension of time for which to  
2 re-file his 28 U.S.C. § 2254 petition.” (Dkt. # 4).

### 3 DISCUSSION

#### 4 Exhaustion of State Remedies.

5 In order to satisfy the exhaustion requirement, petitioner’s claims must have been fairly  
6 presented to the state’s highest court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v.  
7 Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985). No claim in this petition was presented to Washington  
8 State’s highest court as a violation of a federal Constitutional right. A federal habeas petitioner must  
9 provide the state courts with a fair opportunity to correct alleged violations of prisoners’ federal  
10 rights. Duncan v. Henry, 513 U.S.364, 115 S.Ct. 887, 888 (1995). It is not enough that all the facts  
11 necessary to support the federal claim were before the state courts or that a somewhat similar state  
12 law claim was made. Id., *citing* Picard v. Connor, 404 U.S. 270 (1971) and Anderson v. Harless, 459  
13 U.S. 4 (1982). No claim in this petition was presented to the state supreme court as a federal claim.  
14 Thus, the claims in this petition are unexhausted. A federal court faced with an unexhausted petition  
15 dismisses the petition, without prejudice, so that the petitioner has an opportunity to exhaust the  
16 claims in state court. Rose v. Lundy, 455 U.S. 509, 522 (1982). Petitioner should be given that  
17 opportunity.

18 Petitioner’s claims may now be time barred and it would be inappropriate to grant an  
19 extension of time if that were the case. If petitioner re-files, he may raise his arguments as to why  
20 the petition is not time barred at that time. Therefore the motion to extend time should be **DENIED**.

### 21 CONCLUSION

22 Based on the foregoing discussion, the Court should **DISMISS** the petition **WITHOUT**  
23 **PREJUDICE**. A proposed order accompanies this report and recommendation.

24 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure, the  
25 parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed.  
26 R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of  
27 appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule

1 72(b), the clerk is directed to set the matter for consideration on **August 19<sup>th</sup> 2005**, as noted in the  
2 caption.

3 DATED this 25<sup>th</sup> day of July, 2005.

4  
5 /s/ J. Kelley Arnold

6 J. Kelley Arnold

7 United States Magistrate Judge  
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